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# Use and Non-Use of Contract Law in Japan

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# The Use and Non-Use of Contract Law in Japan: A Preliminary Study

WHITMORE GRAY

## Introduction

What is the Japanese attitude toward contracts and contract law? As an American contracts teacher, I have been asked that question repeatedly when I say I have just returned from another period of teaching or study in Japan.<sup>1</sup> While my principal experience has been as a teacher of American contract law to Japanese, both in the United States and in Japan, in the course of this work I have spent a good deal of time asking questions about how things are done in Japan. The more I have learned, the more difficult I have found it to give a general answer to the question.

Often the questioner is concerned with attitudes—i.e., at what point and to what extent do Japanese feel obligated to do what they have promised? This is apt to be a businessman who has heard about some instance where the foreign party found that his Japanese partner wanted to negotiate what the American felt had already been agreed on. Sometimes the questioner is interested in why Japanese use short contracts when longer contracts are common in transactions in the United States. Sometimes lawyers are interested in why there seems to be so little contract litigation in Japan. In the course of many attempts to say something helpful, I have become keenly aware of the need for more thorough study of these questions, and particularly for more adequate data.

During 1981–82 I had the privilege of spending another academic year as a research scholar at the University of Tokyo. I was fortunate to be able to call for advice and guidance on a number of comparative law scholars on the faculty, and particularly on Kōichirō Fujikura, who teaches American law to Japanese students. It was in the course of soliciting his advice about what would be most useful to say concerning the Japanese attitude toward contract that a collaborative effort was decided on.

We decided that we would each conduct a series of interviews with persons experienced in both legal systems, the assumption being that their comparative insights would be valuable, and would in addition help us to formulate further questions to pursue. My assumption was that this was a subject matter which did not lend itself well to quantification, i.e., that we

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*Note:* Mr. Gray is Professor of Law, University of Michigan School of Law; A.B., 1954, Principia College; J.D., 1957, University of Michigan.

<sup>1</sup>My first contact with Japan was an invitation to give a seminar on the Uniform Commercial Code at the Japanese Institute of International Business Law in 1968. Since then I have been a visiting professor at Kyoto University twice, and a visiting scholar for two academic years at the University of Tokyo. During a number of shorter visits to Japan I have given seminars for Japanese businessmen and lawyers, and in 1978 gave a seminar on American contract law in the Kyoto American Studies summer program.

were not looking for a comparison of 27 views one way with 15 another way, but rather that we were looking for anecdotes and insights that the two of us could blend into a helpful description of attitudes and practices, using the anecdotes as illustrations.

We agreed on certain general lines of questioning, and during the academic year 1982–83, each proceeded to conduct some independent interviews. I went to Japan to conduct further interviews in May and June of 1983, but Fujikura was still in the United States after finishing a semester of teaching at Berkeley, so it was not possible to work together further at that time.

After about two weeks of interviews in Tokyo with Japanese practitioners (*bengoshi*) and foreign lawyers, Japanese and foreign company employees engaged in work with legal problems, and consultations with a number of Japanese professors, I realized that the results of these conversations were going to be even more impressionistic and difficult to quantify or compare than we had originally thought. I decided that it would be helpful to work out a questionnaire dealing with the general subject matter of our enquiry, in part because it would be useful for the interview process, and in part because I had come to feel by then that we probably would want to use some type of questionnaire eventually, and that this was a good chance to try out some experimental questions.

I felt it would also be helpful in connection with the interviews themselves. In many cases my subjects were people with whom I had been acquainted for some time. I had previously discussed their contract experiences with them, and I felt a project statement and questionnaire in hand would give a focus and a fresh start which would be helpful. In fact, people did seem to be enthusiastic about the project, and offered to be of assistance in any way possible.

By the end of June 1983, I had interviews with more than 60 people, and had in addition distributed a few copies of the questionnaire to those present in some small group situations where I discussed the project. This article is based on those interviews and on the answers to the questionnaire, which will be discussed below in more detail. It represents a very preliminary first step in the more elaborate study which I hope Fujikura and I will be able to continue in the future.

This article first defines the scope of enquiry, then surveys some of the existing literature, and finally, presents the results of my preliminary survey interviews and questionnaire. It is my hope that it will serve as a basis for discussion leading to better definition of the problems for research in this area, and will suggest ways to proceed to gather the information necessary for more sophisticated exposition and commentary.

## **The Scope of Enquiry**

Since the 1960s, contract scholars in the United States have come to see their academic field as going beyond the doctrinal rules of contract law, and including to some extent the study of contract as an institution in its business context. The principal impetus for this expansion of their intellectual

horizons was the publication in 1963 of two articles by Stewart Macaulay of the University of Wisconsin Law School, "The Use and Non-Use of Contracts in the Manufacturing Industry"<sup>2</sup> and "Non-Contractual Relations in Business: A Preliminary Study."<sup>3</sup> Both studies were based on extensive business interviews, examination of form contracts, surveys of decided cases, and responses to letters of enquiry to businessmen concerning their actual practices. Some of the specific findings are referred to below, but in general the studies showed that businessmen often did not conform to the practices they would have to follow if they were to operate in strict accordance with the accepted rules of contract doctrine. He showed, for example, that they often performed "non-contracts," i.e., that they went ahead with performance in situations where standard doctrine would not have found contract. Macaulay's hope was that this information would be taken into account in contract teaching, as well as in shaping the course of development of rules of commercial law.

In my interviews I explored the general question of whether people feel bound by contractual commitments. While I had often discussed this question with Japanese in a variety of informal situations, through these interviews with professionals with legal training I hoped to get a different kind of insight. Instead of asking the sales people in a corporation about their attitude toward contract, as Macaulay had done—which also is a very good idea—I asked those with legal training about their role in the contract process. When were they consulted and what did they do? Did their clients and employers feel the need to know what the rules of law said and to act accordingly, or were they motivated principally by extra-legal considerations of commercial practice and general fairness? How would they describe the effect of legal ideas, using their own experiences as examples? For example, at the drafting stage—whether the contract is long or short—is the primary emphasis on planning the details of the transaction, or is there a considerable legal input—e.g., to ensure enforceability, to avoid problems with antitrust law or consumer legislation? When modifications are agreed to or disputes are resolved in the course of performance, is use made of legal rules, i.e., do parties describe their positions and frame their arguments in legal terms, or do they approach the issue in terms of current mutual interests and a fair solution for both parties? When a dispute is taken to a third party for resolution, i.e., recourse is had to litigation or arbitration, do the parties emphasize their legal rights or the fairness of the interpretations they advance? Which does the decision-maker emphasize in explaining his decision? My interest was in rules of contract and commercial law in a commercial setting—not in environmental matters, products liability cases, or consumer matters. Certainly there are many basic questions to pursue concerning contract obligations and the "legal consciousness" of ordinary Japanese (and Americans) in other situations, but the focus of my work to date has been on businessmen in commercial dealings.

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<sup>2</sup>Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 THE PRACTICAL LAWYER 13 (1963).

<sup>3</sup>Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REVIEW 55 (1963).

This enquiry regarding the use of rules of contract law brings with it, however, broader questions about the use of contract as an institution—i.e., the use of oral or written contracts, the elaborateness of the planning reflected in the terms, the extent to which the parties provide in the agreement for what the consequences of non-performance should be, etc. While these are not strictly questions concerning the use of rules of law, there is really no clear dividing line, for clauses exempting one party from liability in certain circumstances or providing for a particular pattern of remedy are usually drafted and agreed upon in the light of what result the rules of contract law and the available enforcement mechanism would have given in the absence of such clauses. Even though the choice to use these clauses is non-legal, presumably the choice of content and their drafting call for the use of legal knowledge and skills.

One thing that became increasingly clear to me was the need to attribute every conclusion concerning attitudes to a definite group of actors in contract transactions. A good deal of the misleading comparison of United States and Japanese “attitudes” may have been caused by a failure to do this. For example, when people compare the careful drafting of contracts and strict insistence on contract rights in the United States with informality and a tendency toward accommodation and compromise in Japan, they are usually talking about the attitudes of different groups in the two countries. They are often comparing the attitudes of Japanese businessmen with the attitude of American lawyers. It seems clear from common experience, and is certainly suggested in a number of the Macaulay interviews, that U.S. businessmen would also prefer to deal with people they know well, and when they do, do not feel the need for such elaborate contracts. Moreover, when problems arise in such a relationship, they feel they can be settled by mutual accommodation, without the need to resort to any insistence on legal rights.<sup>4</sup>

By contrast, if the attitudes of American lawyers were compared with those of Japanese lawyers, there would also be a similarity of views. Many lawyers in Japan comment on the unfortunate tendency of businessmen to leave important questions unresolved. In fact, since Japanese lawyers are commonly consulted only for litigation, their principal exposure is to cases where there was no adequate provision in the contract for the difficulty which occurred. The lawyer in the United States may be considerably more knowledgeable about business practices, for he is more likely to be involved on a regular basis in the negotiation and drafting process. One American attorney commented that he found the Japanese lawyers too inflexible and legalistic when they were brought into business negotiations, due in part to their orientation toward litigation.<sup>5</sup>

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<sup>4</sup>*Id.* at 61.

<sup>5</sup>An American attorney who has often used correspondent Japanese attorneys complained that even with their extensive experience in litigation, Japanese lawyers tend to be much less flexible in their doctrinal thinking. American lawyers are used to being able to find respectable authority to support almost any position. The American attorney's explanation was that the *bengoshi's* civilian doctrinal training and the limited amount of case authority in Japan tend to make him take the black letter statement of the legal rule too much at face value.

As for contract practices, the interviews made me very cautious about attributing distinctive features in the two systems to cultural factors or general legal consciousness. In many cases there are other possible causes which should be identified and whose impact should be explored. For example, a fact which is often overlooked in comparing long contracts used in the United States with shorter Japanese agreements in similar situations is the inherent uncertainty of the rules of law in the United States. First there is the problem of choice of law in complex interstate transactions. In addition there is the general difficulty of spelling out precisely the rules of our case law. Since the courts do continue to refine and even change these rules, a prudent lawyer may feel it is desirable to make the contract as self-sufficient as possible. Long lists of definitions of words used are common, and so is the spelling out of legal results of default, etc., in order to minimize differences in results in the various jurisdictions which might be involved, or the inherent uncertainty involved in determining a precise rule of law in a particular jurisdiction according to the case law.

Another thing to consider in comparing both attitudes toward and the use of contract law in the two countries is the difference in the extent of general legal knowledge. While there are many more legal specialists in the United States, i.e., persons whose professions are built on their specialized legal knowledge, in Japan the proportion of the general business population with a legal education is much higher than in the United States. Only an insignificant number of graduates of law faculties become legal specialists, and the vast majority go into general careers in business.

In 1980, for example, there were approximately 150,000 students in university law departments, almost all of whom are headed for careers in business rather than law in the American sense.<sup>6</sup> Each year only about 500 are able to enter the training program required to become a *bengoshi*, though a sizable number who go to work for corporations will at some point in their career spend some time doing work that in the U.S. is done by house-counsel "attorneys."<sup>7</sup> A question to pursue, then, is the effect of widespread knowledge of legal rules in a business community regarded by American lawyers as extremely casual toward the technical legal questions which arise in the course of commercial transactions.

The legal background of Japanese businessmen may help explain why they often seem somewhat skeptical when lawyers talk about the uncertainty of law in the United States. They have learned academically a system of legal rules which appear to lead to relatively clear answers to many legal problems. While Japanese lawyers are a little more aware of the problem of uncertainty in determining precise rules of law because of their greater familiarity with actual practice in which Japanese courts have to give specific content to general rules case by case, differences in "legal method"

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<sup>6</sup>See the figures for law students given by Fujikura, quoted in Brown, *A Lawyer by Any Other Name: Legal Advisors in Japan*, in *LEGAL ASPECTS OF DOING BUSINESS IN JAPAN* 321 (Practicing Law Institute ed., 1983).

<sup>7</sup>For further discussion, see generally Brown, *supra* note 6 at 326 ff.

continue to be at the root of many misunderstandings. In fact, one Japanese lawyer told of his surprise when he found that American law was still rather uncertain, for he had supposed that the large number of case decisions would have resolved most of the questions, unlike Japan where many questions are as yet unresolved by the courts because of the small number of decisions. He was not sufficiently aware of the uncertainty caused by the wide range of often conflicting authorities from many jurisdictions, as well as our lack of rigid adherence to *stare decisis*—in particular, our acceptance of the idea that rules can be reexamined and changed in the light of new circumstances.

## Review of the Literature

A review of the literature shows that in both Japan and the United States there is now acceptance of the idea that field work, or at least some observation of real life, is necessary to enable us to understand fully the legal institution of contract. The influence of Macaulay's work in the United States has been mentioned above, and Japanese contract writing has considered the difference between actual practices and the results that standard doctrine would dictate. Since the amount of data generated by such research is as yet rather limited, legal scholars, and particularly comparativists, continue to be handicapped in their attempts to explain the actual workings of the systems. A review of some of the work done to date may give us a basis for coming to some conclusions as to what should be done next and how.

In reviewing the literature on American law and practice and the literature in English about Japan, certainly the previously cited survey work of Macaulay in the United States and of Toshio Sawada of Sophia University concerning Japan<sup>8</sup> stand out. There are also translations of doctrinal writing by two of Japan's leading contract law scholars which give a broad perspective on the subject of attitudes toward contract. Takeyoshi Kawashima's chapter, "The Legal Consciousness of Contract in Japan," published in *Law in Japan* in 1974<sup>9</sup> from a book published in Japan in 1967<sup>10</sup> has been the most often cited source for foreign authors commenting on Japanese contract law.<sup>11</sup> The article by Eiichi Hoshino, also of the University of Tokyo, "The Contemporary Contract," published in 1972 in the same journal<sup>12</sup> from a book published in 1966 in Japan<sup>13</sup> also deals with both contract practices and theory. In addition, a younger generation of professors in the field of sociology of law has begun to supply us with a view of the operation of the

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<sup>8</sup>J. SAWADA, *SUBSEQUENT CONDUCT AND SUPERVENING EVENTS* (1968).

<sup>9</sup>Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *LAW IN JAPAN* 1 (Stevens trans., 1974).

<sup>10</sup>I. KAWASHIMA, *NIHONJIN NO HO ISHIKI*, (Legal consciousness of Japanese) (1967).

<sup>11</sup>Hahn, *Negotiating Contracts with the Japanese*, 14 *CASE W. RES. J. INT'L. L.* 377 (1982).

<sup>12</sup>Hoshino, *The Contemporary Contract*, *LAW IN JAPAN* 1 (Haley trans., 1972).

<sup>13</sup>Hoshino, *Gendai ni okeru keiyaku* (Contemporary contract), in 9 *GENDAI HÔ* 206 (1966).

Japanese legal system based on data,<sup>14</sup> and their work is complemented by the work of foreign scholars such as John Haley.<sup>15</sup> As for American law, the amount of survey work in the contract field has not been as great as the reception Macaulay's work received in the 1960s would have led one to expect, but the major writers in contract law all accept the premise that a true view of the field of contract must go beyond just the legal realism of the case law and take into account actual business practices.<sup>16</sup>

Macaulay's extensive interviews and surveys documented the fact that many businessmen had a negative attitude toward observance of the accepted rules of contract law in their business life. "Contracts are a waste of time. We've never had any trouble, because we know our customers and our suppliers. If we needed a contract with a man, we wouldn't deal with him." "Lawyers are overprotective and just get in the way of buying or selling. If business had to be done by lawyers as buyers and sellers, the economy would stop. No one would buy or sell anything; they'd just negotiate for ever."<sup>17</sup> He argued for a functional view of contract, considering its separate aspects of "(a) creating an exchange relationship and (b) of solving problems arising in the course of such a relationship."<sup>18</sup> In addition, he stressed the different perception of contract law by the different actors in a transaction—salesman, house counsel, financial officer, and outside lawyer.<sup>19</sup> He also emphasized the fact that the type of transaction provides a necessary basis for elaboration of appropriate legal rules,<sup>20</sup> and showed from his research that the categorization of problems by businessmen was very different from the simplified, stylized categories on which the legal rules were based. As Macaulay noted, "Often businessmen do not feel that they 'have a contract'—rather they have 'an order.' They speak of 'cancelling the order' rather than 'breaching our contract' . . . Lawyers are often surprised by this attitude."<sup>21</sup>

From a comparative point of view, this writing supports the view that the differences in attitude between Japanese and U.S. businessmen may not be as great as some writers indicate. In addition, Macaulay's work is of interest to those who want to explore how the Japanese system of contract works,

<sup>14</sup>See e.g., HŌISHIKI NO KENKYŪ (Research on legal consciousness), 35 HŌSHAKAIGAKU 1 (1983); NIHONJIN NO HŌISHIKI (Legal consciousness of Japanese) 6 (Nihon Bunka Kaigi ed., 1973); NIHONJIN NI TOSHITE HŌ TO WA NANIKI (What law means to Japanese) (Nihon Bunka Kaigi ed., 1974); GENDAI NIHONJIN NO HŌ ISHIKI (Contemporary legal consciousness of Japanese) (Nihon Bunka Kaigi ed., 1982); HŌ-SAIGAN-BENGOSHI: KOKUMIN NO HŌ ISHIKI (Law-trials-lawyers: legal consciousness of the citizenry) (Osaka Bengoshi kai ed., 1977); M. OHKI, NIHONJIN NO HŌ KANNEN: SEIYŌTEKI HŌ KANNEN TO NO HIKAKU (Legal concepts of the Japanese: comparison with Western legal concepts) (1983).

<sup>15</sup>Haley, *The Myth of the Reluctant Litigant*, 4 JOURNAL OF JAPANESE STUDIES 349 (1978).

<sup>16</sup>See, e.g., Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822; Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 WIS. L. REV. 833.

<sup>17</sup>Macaulay, *supra* note 2, at 14.

<sup>18</sup>Macaulay, *supra* note 3 at 56.

<sup>19</sup>Macaulay, *supra* note 2, at 15.

<sup>20</sup>Macaulay, *supra* note 3, at 56.

<sup>21</sup>*Id.* at 61.



and specifically the roles played by contract documents and contract law. Kawashima has pointed out how the legal categories and concepts introduced in the borrowing of European law do not coincide with traditional Japanese thinking.<sup>22</sup> (We might well ask, stimulated by Macaulay's findings, whether data exist to show that they coincide with the thinking of Europeans.) With extensive citation of the Macaulay articles, Hoshino also points out the gap between the written law and practice, and his writing suggests a number of areas for field work which might serve as a basis for a new exposition of Japanese law and practice.<sup>23</sup>

For the American reader interested in pursuing in connection with Japanese law the questions raised by Macaulay, certainly the most interesting and thorough study is that of Toshio Sawada in *Subsequent Conduct and Supervening Events*.<sup>24</sup> While he presents a thorough exposition of the substantive "law" in line with traditional scholarship, he then gives the result of his field work dealing with the problem in actual practice. In the chapter "Beyond the Positive Law: A Socio-Legal Study of Current Japanese Business Practice in its Total Cultural Context,"<sup>25</sup> Sawada gives an excellent model for future field work by others. In testing "the hypothesis that the pertinent positive law rules are generally ignored in business practice,"<sup>26</sup> he found many of the same attitudes encountered by Macaulay. Businessmen answered that they "could hardly utilize legal rules which would work against their own common sense."<sup>27</sup> He also provides a thoughtful and detailed treatment of the broader question whether resort to law in matters relating to contracts is generally incompatible with the basic character of the Japanese.<sup>28</sup> He discusses the frequently-mentioned absence of a sense of "right," but sets off against it the strong Japanese sense of order.<sup>29</sup> He deals with the provocative theme often mentioned by other writers, namely that the Japanese are more interested in the relationship between the parties than in the specifics of the immediate contract, and points out the difficulties this type of thinking creates in saying when there is a beginning or a breach of contract.<sup>30</sup> He raises the question of the impact of the type and availability of enforcement mechanisms within the system,<sup>31</sup> and gives figures regarding the non-use of contract doctrine which can be compared to Macaulay's results.<sup>32</sup>

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<sup>22</sup>Kawashima, *supra* note 9, at 3.

<sup>23</sup>Hoshino, *supra* note 12, at 41-42.

<sup>24</sup>*Supra* note 8. For studies of these phenomena in the United States, see White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life*, in WASHINGTON L. J. 1 (1982).

<sup>25</sup>T. Sawada, *supra* note 8, at 162.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 162, 179 n. 77.

<sup>28</sup>*Id.* at 162.

<sup>29</sup>*Id.* at 177-179.

<sup>30</sup>*Id.* at 180.

<sup>31</sup>*Id.* at 181-185.

<sup>32</sup>On the non-use of contract documents, see T. SAWADA, *supra*, note 8, at 197, 700; Macaulay, *supra* note 3, at 63-66.

Recently there has been a good deal of activity in Japan in the field of sociology of law, and some of it has produced data of substantial interest for understanding the field of contract law and practice. Kahei Rokumoto of the University of Tokyo, in a piece entitled "Legal Behaviour of the Japanese and the Underlying Notion of Social Norms,"<sup>33</sup> gives us an example of the direction such research is likely to take in the future—and the light it may shed on actual practices and attitudes in Japan.

Let us now look directly at the parties to legal problems, in order to see the patterns of legal behaviour where problems are solved without recourse to legal proceedings. First, I would like to discuss how ordinary citizens turn to a third party for help when faced with a legal problem. I have conducted surveys on this question and have noted the following characteristics in attitudes and behaviour: . . . These findings suggest that ordinary citizens resolve legal problems at the lowest possible cost under the general condition of "legalization of social order"—that is, the condition that it becomes increasingly difficult to solve conflicts without recourse to the consciously made rules of positive law, as traditional customary norms and implicit moral precepts lose their force.<sup>34</sup>

Hopefully we are also at the beginning of a more sophisticated literature by those looking at Japan from the outside. One as yet unpublished article by an American practitioner with considerable experience actually working in both systems affords both intellectual and practical insight into the use of contracts and contract law in Japan, and makes a real contribution to the body of existing literature designed to smooth the way for the neophyte foreign lawyer in his contacts with Japan.<sup>35</sup> Collaboration between Japanese and foreign scholars will hopefully continue to produce works of comparison which will provide valuable insights for both. This type of collaboration made the original volume of *Law in Japan: The Legal Order in a Changing Society*<sup>36</sup> an example for comparative scholarship which has rarely been equaled. Another recently published paper is the result of teaching collaboration between an American professor of contracts and a Japanese professor of psychology.<sup>37</sup>

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<sup>33</sup>Rokumoto, *Legal Behavior of the Japanese and the Underlying Notion of Social Norms*, in *THE ISLAMIC WORLD AND JAPAN* 207 (Japan Foundation ed., 1981).

<sup>34</sup>*Id.* at 211.

<sup>35</sup>Paul N. King, *Contracts in Japan and the U.S.—Misconceptions About Cultural Differences and Synacultural Bases for Cooperation* (unpublished manuscript, n.d.); see also Hahn, *supra* note 11; Mori, *A Practitioner's Perspective in Negotiations and Communication with Japanese Businessmen in Current Legal Aspects of Doing Business in Japan and East Asia* 47 (Haley ed., 1978); Narcisi, *Advising Japanese Corporations Doing Business with Americans*, 29 *BUSINESS LAWYER* 836 (1974); Guittard, *Negotiating and Administering an International Sales Contract with the Japanese*, 8 *INTERNATIONAL LAWYER* 822 (1974); Henderson, *The Role of Lawyers in U.S.-Japanese Business Transactions*, 38 *WASH. L. REV.* 1 (1965).

<sup>36</sup>*LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* (Von Mehren ed., 1963).

<sup>37</sup>Wagatsuma & Rosett, *Cultural Attitudes Toward Contract Law: Japan and the U.S. Compared*, 2 *U.C.L.A. PACIFIC BASIN L. J.* 76 (1983).

## The Questionnaire

The preliminary questionnaire (Appendix) I administered was designed to serve two purposes. Obviously it would be helpful to have some additional information about the attitudes and experiences of those working with the legal problems of business relations which used contracts. It was equally important as a chance to get some information about various kinds of questions dealing with these problems, and the responses they might elicit, for this questionnaire was intended as the first step in elaborating a more comprehensive questionnaire that could eventually be given to a broader cross-section of Japanese and American lawyers and in-house legal staff. That group would include a broader sample of the same international types I talked to in connection with this questionnaire in 1983,<sup>38</sup> but also, hopefully, a control group in both countries who deal mainly with domestic contract matters.

In drafting what I thought should be a short questionnaire, I tried to pick up some of the more interesting themes that had come up frequently in my initial interviews. First of all, I was interested in the degree to which lawyers, i.e., Japanese *bengoshi* or foreign attorneys, as distinguished from in-house legal staff, were involved in the process of negotiating and drafting business contracts, or in negotiating solutions to disputes which arose in the course of performance of a contract. In addition to asking about the attorney's contract work, this group of questions asks whether the other side also used a lawyer, and also asks in-house legal staff how frequently they go to outside lawyers for legal advice.

Another principal focus of my discussion was the use of contract law as such. In other words, how often did specific legal questions come up in connection with drafting, as contrasted with simply setting forth carefully the details of the deal? Questions regarding the inclusion of clauses restricting or expanding the liabilities of the parties are designed to highlight drafting activity where legal knowledge is needed. Another question tests the use of legal rules by asking about the need for legal research and the source of the information. Others ask about the way the parties argue in dispute resolution, i.e., emphasizing legal rights or a fair compromise, assuming that legal-rights arguments would require a knowledge of the more technical rules of interpretation and substantive law.

The third focus was the form and content of the contract document. People often make comparisons between the U.S. and Japan in terms of long vs. short, so I asked about the desirability of adding a number of specific clauses to the typical contract. While much of the length comes from the detailed planning of the performance, Americans do tend to include a number of "legal" provisions, and I was particularly interested in them because selecting or drafting them entails the use of specialized legal knowledge. I had often been asked during the interviews for my opinion

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<sup>38</sup>There is one *bengoshi* included in the survey results whose Kyoto practice is a purely domestic one.

concerning clauses dealing with choice of law, arbitration, and limitation of remedies, so I asked the question as to what advice they were giving to their clients or employers in that regard. In my interviews, several informants had stated that while they sometimes tried to assure a certain substantive result by use of a choice of law clause, it was obviously better, particularly in an international contract, to spell out the desired result in the contract. A related question concerns whether they would be happy to leave many of these questions to Japanese law if the parties could agree on that as a choice of law, or whether, as some informants suggested, even Japanese law was either unsatisfactory or not sufficiently clear on some of these important topics.

I also asked whether people saw any relationship between the frequency of occurrence of disputes in the course of contract performance and the amount of detail in the contract, i.e., did more detail help avoid misunderstandings and resolve disputes.

As an inexperienced survey researcher I needed more help in the form and phrasing of the questions than was available there on the spot. While in the course of my interviewing I did have the benefit of consultation with two of the leading professors in the field of sociology of law in Japan, their advice went more to suggested approaches for subsequent research, and I must take all the blame for the shortcomings of this preliminary effort.

My cultural biases made it hard for me to draft questions for the Japanese respondents, but I tried to test various possible approaches on the people I was interviewing while I was drafting. For example, I found it was particularly difficult to evaluate answers to questions involving an overview of the individual's experience. I wanted to know, for example, how often a legal staff member of a corporation had consulted outside counsel, but what words would best describe varying degrees of frequency? I found when I asked people what they meant by "often," they described it as "a significant number of times—not necessarily the majority." This seemed to be what I wanted to know, and avoided their having to make a value judgment about whether it was more than half the time. To describe the case where they had done it, but not "often," people seemed to feel most comfortable with "seldom," though some preferred "sometimes." With hindsight, I think it would have been better to offer a scale from "always" to "sometimes" to "never," with five or six choices. (At least for the purposes of evaluating the results here, however, the idea of "often" as meaning a significant and "seldom" an insignificant number of instances should be kept in mind, for that was usually included in my explanation when the questionnaire was given to the informants.)

I did not include in the questionnaire any hypothetical illustrations of what I was referring to in the questions, and that was partly because in most instances I was discussing the general subject matter at some length with the informant as part of the distribution process. On the returned questionnaires, however, there were enough comments to the effect that the thrust of the question was not clear to make me lean toward the inclusion of more explanation, possibly including hypotheticals.

The questionnaires were distributed over a four-week period in May and

June of 1983. I gave them to the people with whom I had talked informally during the first part of my stay in Tokyo, with an explanation that I would now like to have in survey form their answers to the same kinds of questions we had talked about informally before. I then gave them to each of the people I met with for informal discussion of their contract experiences—in all, more than 60 people. In addition, I discussed the questionnaire with a number of law professors, who were asked for their suggestions but were not asked to complete the form.

I distributed a total of 75 copies. About 60 of these were given to individuals being interviewed, and a few others were given to such individuals to be given to other persons with an explanation. A few copies were also handed out at meetings where lawyers and businessmen were present, such as Rotary luncheons, and these were the only situations where I did not know either the individual or his employer from prior contact.

Group members were, obviously, pre-selected on the basis of their known experience with contract matters and the likelihood that they would cooperate with the project. While the questionnaire was designed to take only a few minutes to answer, there was considerable reluctance on the part of people I did not previously know well even to consider answering questions of this sort. There was also the problem that the questionnaire was only in English, so the group of potential informants was limited in that respect. Even in the group who returned questionnaires, a number said they felt uncomfortable answering the final question, which asked for a description of a situation from their experience which would illustrate the points raised in the questions. My impression was that this was in part because they were hesitant to put down in writing a description of their client's or company's affairs, but also in some cases because they were hesitant to write it in English. (In fact, some wrote in Japanese and one in French.) Obviously any questionnaire for broader distribution in the future should be available in both English and Japanese, and should specify that answers may be written in any language the informant chooses.

## The Results

This article is based on 32 returned questionnaires—22 from Japanese, 9 from non-Japanese working in Tokyo, and one from an American lawyer who previously worked in Tokyo. The median age of the group is about 35. It includes 16 lawyers, i.e., foreign attorneys or Japanese *bengoshi*. One of the foreign attorneys is working full-time in Tokyo for a Japanese company, and the other is a legal attaché in an embassy. The other 16 are working with companies or banks, doing some work with contracts. The amount of contract work indicated ranged from 100 percent to less than 5 percent, with the median falling in the 70 percent group. Six company people fell below 70 percent, as did four attorneys, two Japanese and two foreign.

The questionnaire is divided into a part for attorneys, a part for company and bank employees, and then some final questions to be answered by all. It was also designed to differentiate among practices and attitudes at the drafting, informal dispute, and litigation or arbitration stages.

In the lawyers' questions, the aim was to see to what extent they participated in negotiation and drafting of contracts—i.e., to test the common statement that they are usually only called in at the litigation stage. (Of course, these are presumably almost all international transactions, and the general statement is usually made with the normal domestic practice in mind.) Almost all the lawyers—94 percent—said they had participated in drafting, though of these only 43 percent had often participated directly in the negotiations. Another 36 percent had participated in the negotiations only occasionally (seldom), and 21 percent not at all. Eighty percent had often participated behind the scenes, and 57 percent had often given informal advice before the negotiations began. (The figures are given in percentages here. The absolute numbers of the responses would be somewhat misleading, for some respondents did not answer all applicable questions. Particularly for purposes of comparison with similar questions asked of the various groups, this seemed more helpful. In the copy of the questionnaire and results in the Appendix, the actual responses are indicated in parentheses whenever any percentage figures are given. In addition, 87 percent of these lawyers said that in transactions in which they were consulted, the other side often was also consulting a lawyer, while 13 percent said the other side had a lawyer only occasionally (seldom).)

I had assumed that in many of the international transactions the lawyers would be consulted for help with legal terminology, but in fact the results showed that it was overwhelmingly for more rule-oriented lawyer knowledge and lawyer skills that they were retained. In a question where respondents could indicate in order of importance two purposes for which they had been consulted, they indicated it was for help in drafting and for specific legal advice, primarily on contract law. Only three foreign lawyers said they had been consulted for help with English legal terms, and even for them that was in second place. All told, weighted figures (using a point system to take into account first and second rankings) give 45 percent of the total points for helping in drafting, 33 percent for help regarding specific contract law questions, 12 percent for advice on other legal points, and 9 percent for help with English legal terms.

When asked whether they had been involved in negotiations to resolve a dispute, 88 percent said Yes. (In a subsequent question they indicated that only 67 percent had participated in litigation or arbitration involving contract rights, perhaps indicating in part that only some of these disputes went on to that stage.) In line with my interest in determining the role of rules of contract law, the lawyers were asked whether the parties had tried to insist on their strict legal rights or had argued for a compromise based on business considerations. While naturally in many cases both arguments are advanced, 57 percent of the respondents said their clients often had insisted on their strict rights, though 92 percent said they (also) had argued for a compromise. As to the results of these negotiations, 86 percent said their cases resulted in compromise, and only 14 percent said the result was getting the promised performance.

Of those who had participated in litigation or arbitration of claims, 38

percent said their clients had often asked for some kind of specific performance or injunction, and 100 percent said that money damages had been claimed. (How this fits with the statement commonly made that specific relief is the norm in civil law systems is an interesting question.) The next question asked whether these cases were eventually decided on the basis of the technical contract rights of the parties, or whether they were compromised in some way before decision. This unfortunate phrasing confused two interesting points, i.e., the number that went to judgment or award, and what the basis was for the decision if that happened. In Japanese court practice there is a formal attempt at conciliation before proceeding with the trial, and during the trial the judge may attempt to bring about a compromise, so respondents may have had difficulty in choosing an answer. Some answered Often to both alternatives, and while it may be they meant they had a significant number in each category, they may have meant that in an individual case a compromise was reached and that a judgment was then rendered on that basis rather than on the basis of the strict rights originally asserted. Perhaps it is helpful to compare the Often responses—i.e., 36 percent for technical rights and 64 percent for compromise.

Similar questions were posed to those working for banks and companies. As for drafting, 86 percent of the respondents said they were often involved, and 100 percent of that group felt they used their technical legal knowledge in that work—i.e., that this work involved more than just putting the deal into written form. Corroborating their reliance on their own knowledge in the contract law area were their answers to the effect that only one third often did research or got an opinion concerning points of contract law, while 79 percent often did so concerning other technical legal points, such as tax, corporation law, etc. As to the source of such information, 80 percent said it was often obtained internally, leaving 20 percent who usually went to outside counsel. In a follow-up direct question about resort to outside counsel, one third said they often went to outside counsel, 47 percent said Seldom, and 20 percent said Never.

Eight-seven percent of the respondents had been involved in negotiations for settlement of a dispute arising in the course of performance of a contract, and 58 percent of this group said that their company often made its arguments in terms of its legal rights—though 75 percent also said that they argued for a fair compromise based on the circumstances. While 92 percent said the disputes were resolved by compromise, 27 percent said the result was that one party recognized the legal rights of the other. Again the ambiguity of the question as to whether a choice should be made led to some choosing one or the other and some giving indications that both results happened “often,” i.e., a significant number of times in their experience. Comparing just the Often responses, 80 indicated compromise and 20 percent, recognition of legal rights.

The last set of questions was to be answered by all respondents. This was concerned with the contract document itself, and in particular, what should go into it and why. As to the desirability of longer or shorter contracts, 36 percent said that disputes have been more common under short contracts in

general terms, but 64 percent said that in their experience they had not seen a relationship between the detailed nature of the contract document and disputes arising under it.

When asked whether they would advise their client/employer to include certain provisions, the responses were generally in favor of inclusion. As for clauses dealing with dispute resolution—e.g., conciliation or arbitration—69 percent said they would often advise inclusion, and as for remedy provisions such as exclusion of consequential damages or provision for liquidated damages, 72 percent often advised inclusion. Respondents were then asked whether they would advise the inclusion of a clause calling for good-faith negotiations in the event of dispute—a very common clause in Japanese contracts, but one regarded as without much legal significance by US lawyers. Seventy-two percent said they would often so advise, and this included 71 percent of the foreign attorneys.

In my discussions prior to drafting the questionnaire, the suggestion was made that the sophisticated drafter included some of the clauses mentioned above because even Japanese law on these points (and others, such as frustration) was not particularly clear or satisfactory. Others had said the reason for inclusion was to minimize the effect of any uncertainty about results when foreign law was chosen, while others said these clauses were desirable in making the prospects clear to the parties even when the legal result would be the same. In a final question designed to provide some information on one of the possible reasons, all were asked to respond to the view of some people that detailed contracts are needed because the rules of Japanese contract law are not very satisfactory. Sixty-eight percent said they thought the rules in general were satisfactory, and this group included all the foreign respondents as well as all but one of the *bengoshi*. Twenty-three percent of those expressing an opinion said the rules were not very satisfactory, and 9 percent said they are very unsatisfactory.

Some respondents did not express an opinion as to whether Japanese law was satisfactory or not, but gave additional comments. One 45-year-old American attorney working full-time for a Japanese company said, "Detailed contracts appear often to be counterproductive to businessmen's goal of favorable business over the long term." Another foreign respondent said that long contracts were necessary because of the Japanese Fair Trade Commission, and another foreigner said that while he prefers short contracts, details are often necessary when the relationship is complex. One young Japanese legal staff member said that specific provisions are necessary for all contracts, because no country's laws are satisfactorily detailed. Obviously this is an interesting area for some further inquiry, for the responses do not seem to be in line with many of the stereotypical views of Japanese or foreigners.

The final item on the questionnaire was not a question, but rather a request for some anecdote which might give practical insight into the kinds of problems touched on in the questions. Many of the respondents did not give the type of answer I had hoped for, in part, no doubt, because this would have taken a good deal of time, whereas the rest of the questionnaire could be done in about ten minutes. I had hoped that people would



describe for me in some detail and in more organized fashion the kinds of situations they used to illustrate their answers when I posed similar questions during the interviews. Apparently this expectation was unrealistic, however, and my inclination would be to limit whatever further questionnaire is worked out to objective, or at most, short-answer, questions.

A number of respondents used the page of the questionnaire left blank for the answer to this final question to give some very interesting comments on the general topic of the survey. One foreign lawyer said:

I do not find much difference between Japanese and U.S. clients. I believe Japanese know far less than they think about U.S. businessmen and U.S. lawyers." "Our [Japanese] clients meticulously plan and draft contracts, but often seemingly without a good grasp of occasions for problems . . . Problems in Japanese-U.S. contracts have occurred because of unilateral action by one of the parties—reorganizing by the U.S. party, taking action in the Japanese market by the Japanese party. Japanese parties look to the contract for support of their position . . . Problems are usually resolved, as elsewhere, by telexes, letters, proposals and counterproposals, amendments to the agreement, conferences, etc. . . . Often Japanese parties accuse the other of not "understanding." Often misunderstanding is mutual or even reversed. Resolution is reached, as elsewhere, by either side.

In his experience of five years in Japan, there had never been recourse to lawyers, and all questions of interpretation and disputes had been settled by the parties.

## Conclusion

What have this first round of interviews and the preliminary survey questionnaire shown about the problem, and what insights have they given into methodology to be followed in the future?

As to the substance of the problem, I was struck even in my first interviews by how misleading the statements commonly made about the Japanese attitude toward contractors are because of over-generalization. For example, some of the *bengoshi* I talked with appeared to have created a type of law practice very much like that of the American corporate lawyer—very little litigation, and regular participation in the day-to-day affairs of a number of clients on a wide range of corporate matters, including the negotiation and drafting of ordinary contracts. Some of the company employees enjoyed a relation with outside counsel that was very familiar from my own American practice experience—and they told of expenditures for legal counsel that confirmed the extent of the relationship. (It was interesting that there was not always very great awareness among the various people I interviewed about the actual situation in Japan outside their own personal experience. For example, the *bengoshi* mentioned above said that the type of reliance on outside counsel he described in his own practice was only likely in the case of smaller or medium-sized corporations, which

do not generally have their own legal affairs department. The corporate example of that kind of relationship I mentioned, however, was in fact one of Japan's very large companies.)

Examples like these could be multiplied, and they raise for me a question as to whether it is wise to come to any general conclusions at all. At least they show how important it is to give the reader as much as possible of the data on which any conclusions are based. When I discussed this project with a leading Japanese professor of sociology of law, he was rather skeptical about any conclusions at a general level. He felt that the only way to get an accurate insight into attitudes and practices was to confine investigations to particular lines of business or types of transactions. In fact this is what Macaulay did subsequent to his initial broader survey, when he studied the relationship between auto manufacturers and their dealers in depth.<sup>39</sup> For the scholar interested in having his work read, however, it is interesting to note that it is the more general work of Macaulay that has had the major impact and that continues to be cited more than 20 years after the research was done.

The comments of those who responded to the survey also tended to support this need to recognize discrete areas of inquiry. Many said in their answer to questions, "It depends." They said their answers would be different depending on whether it was a domestic or international transaction; a contract between established business partners or a one-shot transaction; a long-term manufacturing and supply contract or a single purchase. Many pointed out that their advice would be different depending on which side they were advising. My conclusion was that it would be desirable in subsequent interviews and questionnaires to indicate clearly the particular subgroups of actors and transactions, even though it might subsequently be possible and desirable to come to some meaningful generalizations by careful grouping of the responses from these subgroups, etc.

Many substantive questions were also suggested by the interviews and responses to the questionnaire. Are lawyers really becoming significantly more active in domestic non-litigation-connected corporate advice? If so, is this due to the influence of the international practice, or might it be a natural development from the emergence in Japan of more legal regulation? Or is it rather, as one lawyer suggested, a spill-over from the increase in litigation? (He explained that after working with him on a litigated contract problem, clients consulted him for legal advice in connection with drafting of subsequent contracts, so as litigation increases, he expects his corporate practice to increase also. He thinks that for the first time many firms have begun to see the need for preventive legal services even in purely domestic matters.)

It is the author's hope that this preliminary report will encourage further field work and examination of legal materials in pursuit of answers to the questions raised above concerning the use of contract doctrine and the

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<sup>39</sup>S. MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966).

attitude toward contract obligations in Japan and the United States. Which of the issues raised should be pursued first, and particularly, what methods of investigation are likely to be most productive? The advice and suggestions of readers are earnestly solicited.

## APPENDIX

### QUESTIONNAIRE

#### THE USE AND NON-USE OF CONTRACT LAW IN JAPAN AND THE U.S.

Professor Kōichirō Fujikura of Tokyo University and I are engaged in a study regarding the attitude today toward contracts and the use of contract law in Japan and the U.S. We would appreciate your assistance at this preliminary stage in connection with working out a questionnaire which will be given eventually to lawyers and businessmen in both countries. The questions below deal with the areas we are interested in, and are examples of the kinds of questions that we plan to ask. We would appreciate your doing two things. Please answer the questions, but also, please comment on the question if it is unclear, or explain any difficulty you had in choosing an answer. We would also appreciate any general comments, or suggestions you might have for other questions to ask.

It is not necessary to put your name on the questionnaire. We do not want to be able to identify the source of any particular information or of the comments. Please return your questionnaire in the next few days in the attached stamped addressed envelope.

Thank you very much. We hope that this project will contribute to a better understanding of contemporary attitudes and practices in this area of business and law, and in some degree help to avoid misunderstandings between parties in their dealings. Your help in getting this project started is much appreciated.

Whitmore Gray  
Professor of Law  
University of Michigan Law School

Tokyo, May 1983

1. My nationality is:

- 22 a. Japanese  
9 b. U.S.  
1 c. Other French

2. My age is:

- 6 a. under 30  
10 b. 30–35  
4 c. 35–40  
3 d. 40–45  
4 e. 45–50  
5 f. Over 50

3. My professional situation is:

- 14 a. Attorney/*bengoshi*  
9 b. Company legal  
6 c. Company, but not dealing with legal matters  
2 d. Bank  
1 e. Other Legal attaché

4. a. Have you participated in the negotiation or drafting of contracts, or in the resolution of disputes under a contract?

\_\_\_\_ YES      \_\_\_\_ NO (If your answer is NO, skip to Question 23.)

- b. Portion of my work which deals with contract matters: \_\_\_\_\_ percent.

100=3	40=3
95=2	30=3
90=3	20=1
85=1	15=2
80=2	10=2
75=2	5 or below=3
70=4	

(If you are an attorney/*bengoshi*, please answer Questions 5 through 15. If you are not, skip now to Question 16.)

5. Have you participated in the drafting of commercial contracts?

15 YES      1 NO  
(If your answer is NO,  
skip to Question 9)

6. If so, did you

- a. participate in negotiations?

<u>43%</u> Often	<u>36%</u> Seldom	<u>21%</u> Never
(6)	(5)	(3)

- or b. participate behind the scenes?

<u>80%</u> Often	<u>15%</u> Seldom	<u>7%</u> Never
(12)	(2)	(1)

- or c. did you only give informal advice before the negotiations began?

<u>57%</u> Often	<u>21%</u> Seldom	<u>7%</u> Never
(8)	(3)	(3)

7. In the situations you referred to in Question 6, please say, if you know, whether the other side was also using an attorney/*bengoshi*.

<u>87%</u> Often	<u>13%</u> Seldom	____ Never
(13)	(2)	

8. For what principal purposes was your client using you? (Choose one or two items. Mark most important 1, next as 2.)

<u>45%</u>	a. Help in drafting contract provisions.
<u>9%</u>	b. Help with English legal terms.
<u>33%</u>	c. Help regarding specific contract law questions, including questions concerning drafts submitted by the other party.
<u>12%</u>	d. Advice regarding other legal questions, such as tax, corporation law, etc.

(In items a & b, I have rated first choice as "4" and second choice as "3"; figures given = % of total.)

9. Have you been involved in negotiations to resolve a dispute between contract parties?

14 YES      2 NO (If NO, Skip to Question 13.)

10. If so, did you

a. participate in the negotiations?

54% Often      31% Seldom      15% Never  
(7)                      (4)                      (2)

or b. did you participate behind the scenes?

83% Often      17% Seldom      \_\_\_\_\_ Never  
(10)                      (2)

or c. did you only give informal advice before the negotiations began?

50% Often      33% Seldom      17% Never  
(6)                      (4)                      (2)

11. Did the parties try to

a. insist on their strict legal rights

57% Often      43% Seldom      \_\_\_\_\_ Never  
(8)                      (6)

or b. did they argue for a compromise based on business considerations?

92% Often      8% Seldom      \_\_\_\_\_ Never  
(12)                      (1)

12. Were the results reached in fact in these cases compromises, or was the result based on a recognition of the legal right to performance as promised?

86% Compromise      14% Performance  
(12)                      (2)

13. Have you participated in litigation or arbitration involving assertion of contract rights?

10 YES      5 NO      (If NO, skip to Question 23.)

14. What was being asked for in those cases?

a. Some kind of specific performance or injunction?

38% Often      50% Seldom      13% Never  
(3)                      (4)                      (1)

b. Money damages?

100% Often      \_\_\_\_\_ Seldom      \_\_\_\_\_ Never  
(10)

or c. Other relief (specify)?      (1) termination

15. Were these cases

a. decided on the basis of the technical contract rights of the parties:

5 Often      4 Seldom      0 Never

or b. compromised in some way before final decision?

9 Often      1 Seldom      0 Never

(Some respondents said "often" for both.)

(If you are an attorney/*bengoshi*, skip now to Question 23. If you are not an attorney/*bengoshi*, please answer Questions 16 through 22.)

16. How often have you been involved in your company or band in the drafting of contracts?

86% Often      14% Seldom  
(12)                      (2)

17. Did you feel that you used your technical legal knowledge in that work?

86% Often      14% Seldom      \_\_\_\_\_ Never  
(12)                      (2)

(In questions 16 & 17, those answering "often" and "seldom" were the same.)

18. In connection with negotiations or drafting, was it necessary to do research or get an opinion

a. concerning points of contract law?

33% Often      67% Seldom      \_\_\_\_\_ Never  
(5)                      (10)

b. concerning other technical legal points, such as tax, corporation law, etc.?

79% Often      21% Seldom      \_\_\_\_\_ Never  
(11)                      (3)

19. If so, was that information

a. obtained internally

80% Often      20% Seldom      \_\_\_\_\_ Never  
(12)                      (3)

or b. did you go to an outside lawyer/*bengoshi*?

33% Often      47% Seldom      20% Never  
(5)                      (7)                      (3)

20. Have you been involved in negotiations for settlement of a dispute arising in the course of performance of a contract?

13 YES      2 NO      (If NO, skip to Question 23.)

21. In those negotiations, did your company make its arguments in terms of its legal rights?

58% Often      42% Seldom      \_\_\_\_\_ Never  
(7)                      (5)

or did it argue for a fair compromise based on the circumstances?

75% Often      17% Seldom      8% Never  
(9)                      (2)                      (1)

22. Were these disputes in fact resolved by compromise?

92% Often      8% Seldom      \_\_\_\_\_ Never  
(12)                      (1)

or was the result that one party recognized the legal rights of the other?

27% Often      73% Seldom      \_\_\_\_\_ Never  
(3)                      (8)

(The following questions are to be answered by all.)

23. In your experience, has there been a relationship between the detailed nature of the contract document and the disputes arising under it, i.e., have disputes been more common for short contracts in general terms?

36% YES      64% NO  
(9)                      (16)

(Additional responses included (2) It depends; (1) No opinion; and (2) Don't know.)

24. Would you advise your client/company to include in a contract provisions dealing with dispute resolution, for example, a clause providing for conciliation or arbitration?

<u>69%</u> Often	<u>31%</u> Seldom	_____ Never
(20)	(9)	

25. Would you advise your client/company to include a clause to the effect that in the event of a dispute, the parties will confer in good faith (*sei-i o motte kyōgi suru, kyōgi suru, kyōgi ni yori enman ni kaiketsu suru*, etc.)?

<u>65%</u> Often	<u>32%</u> Seldom	<u>3%</u> Never
(20)	(10)	(1)

26. Would you advise your client/company to include provisions regarding remedies for non-performance, for example, a clause excluding consequential damages, a clause providing for liquidated damages, etc.?

<u>72%</u> Often	<u>24%</u> Seldom	<u>4%</u> Never
(21)	(7)	(1)

27. Some people say it is good to have rather detailed contracts because the rules of Japanese contract law are not very satisfactory. Do you agree?

a. In general, they are satisfactory. (15)	<u>68%</u>
b. They are not very satisfactory. (5)	<u>23%</u>
c. They are very unsatisfactory. (2)	<u>9%</u>
d. Other opinion _____	

28. Please describe briefly one or two matters from your experience that illustrate the use or non-use of technical rules of contract law in connection with the drafting of contracts or the resolution of contract disputes. It would be helpful for us to have some details as to:

1. the nature of the drafting or performance problem;
2. the issues or arguments made by the parties; and
3. how the problem was resolved.

(Here approximately one-half page was provided for the examples.)

Thank you very much for your assistance.

Kōichirō Fujikura  
Whitmore Gray